Nos. 82-1186 and 82-1465

In the Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC., PETITIONER

v.

FRANKLIN MINT CORPORATION, ET AL.

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v.

TRANS WORLD AIRLINES, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether recent international monetary developments and the repeal in 1978 of the Par Value Modification Act, former 31 U.S.C. 449, render unenforceable in United States courts the limitations on carrier liability, stated in terms of quantities of gold, prescribed by Article 22 of the 1929 Warsaw Convention on international air transportation.

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INTEREST OF THE UNITED STATES

This case presents a substantial question of recurring importance respecting the enforceability in United States courts of key provisions of the Warsaw Convention on international air transportation.[1] The Warsaw Convention creates a uniform regime to govern the international car-

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[1] This treaty, universally known simply as "the Warsaw Convention," is more properly termed the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 1502 note. The United States has been a party to the Warsaw Convention since 1934.

riage of passengers, baggage and cargo by air, including rules governing tickets, baggage checks and air waybills, and regulates the liabilities of carriers. Generally speaking, under Articles 18-21 of the Convention, carriers are presumptively liable for the loss of shipped goods. As quid pro quo for this rule favoring shippers, the liabilities of carriers are limited. Article 22(2) of the Convention provides in pertinent part:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. * * *

Article 22(4) provides that the currency unit employed in the Convention "shall be deemed to refer to the French franc consisting of 65½ miligrams of gold at the standard of fineness of nine hundred thousandths." This unit is generally known as the Poincare franc.

The court of appeals has declared unenforceable the limitation on liability for loss of, or damage to, goods shipped by air in international commerce subject to the Warsaw Convention. This decision, if allowed to stand, will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally. The United States continues to regard the Warsaw Convention as a binding international agreement. See U.S. Dep't of State, *Treaties in Force* 207-208 (1982). Indeed, if the United States wished to terminate its participation in the system established by the Convention, it would be obligated to give its treaty partners six months' notice. Art. 39(2). The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry.

The Department of State informs us that several foreign governments have expressed their view that the court of appeals' decision will seriously affect United States rela-

tions in international aviation. Pursuant to the United States' obligations under the Convention itself, and under the generally recognized principle of international law pacta sunt servanda ("treaty obligations must be observed"), the United States is required to uphold the Convention's enforceability. Only if there is a clear decision by the political branches of the federal government to abrogate a treaty, by formal executive denunciation or legislative mandate, should the courts take the extraordinary step of placing the United States in violation of its international commitments.

The United States also has a substantial interest in assuring that this Nation's treaty obligations are applied uniformly throughout the federal court system. Because the decision of the court of appeals is at odds with those of other federal courts that have considered the questions presented, and because the issues involved are recurring ones, this interest is adversely affected by the court of appeals' ruling.

STATEMENT

1. Franklin Mint Corp. brought this action in the United States District Court for the Southern District of New York to recover damages from Trans World Airlines, Inc. for the loss of a shipment of 714 pounds of numismatic material that was carried by TWA from New York to London. The freight charge for the shipment was $544.96. Although Franklin Mint subsequently claimed that the coins were worth $250,000, it did not make a special declaration of value, as permitted by the Warsaw Convention. The parties stipulated that the action was governed by the Warsaw Convention and that TWA was liable for the loss (Pet. App. A-3 to A-4).[2]

TWA moved for partial summary judgment, asserting that under Article 22 of the Warsaw Convention its liability should be limited to the equivalent of 250 francs per kilogram of cargo weight and that each franc should be evaluated as "65½ miligrams of gold at the standard of fineness

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-1186.

of nine hundred thousandths." The parties agreed to the applicability of this standard and the weight of the shipment. The only dispute concerned the rate at which the liability limitation, stated in Article 22 of the Convention in terms of gold francs, was to be translated into dollars.[3] Franklin Mint argued that its recovery should be converted into dollars through use of the free market value of gold. TWA claimed, instead, that damages were to be computed through use of one of three conversion measures: (1) the official price of gold ($42.22 per troy ounce) that prevailed under the Par Value Modification Act, former 31 U.S.C. 449, prior to its repeal,[4] (2) a price adjusted by reference to the

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[3] The parties apparently agreed that the actual value of the shipment exceeded the limitation rate; accordingly, no question of actual value was presented.

[4] In 1945, the United States and other countries, in accepting membership in the International Monetary Fund, undertook to maintain a "par value" for their currencies, expressed in terms of gold, and to convert foreign official holdings of their currencies into gold or the currency of the holder, at the request of the holder. See Bretton Woods Agreements Act, ch. 339, 59 Stat. 512; Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501. In practice, most countries maintained par values for their currencies by official intervention in the foreign exchange market (*i.e.*, by buying and selling their currencies against dollars, in order to keep currency exchange rates within narrow margins). The United States met its par value obligations by undertaking freely to buy and sell gold in exchange for officially held balances of dollars at the official price of gold—the dollar's par value. Gold was both the unit of account for par values and the main reserve asset of the monetary system.

The Bretton Woods system ultimately proved insufficiently flexible to accommodate major changes in the world economy and, in particular, shifts in the economic position of the United States relative to other major countries. Consequently, in August 1971, the United States suspended convertibility of foreign official holdings of dollars into gold as the initial step in a major realignment of exchange rates and a reform of the international monetary system. Realignments of exchange rates occurred in December 1971 and February 1973. Concomitant changes in the par value of the dollar were approved by Congress. Par Value Modification Act, Pub. L. No. 92-268, Section 2, 86 Stat. 116, as amended by Pub. L. No. 93-110, Section 1, 87 Stat. 352. In 1973, however, after the second major realignment of exchange rates and in response to severe market pressures, many nations moved to "floating" exchange rates. In 1976 the IMF nations agreed in the Jamaica Accords to amend the IMF Articles to relieve the United

value of the Special Drawings Rights (SDRs) established under the auspices of the International Monetary Fund,[5] or (3) the exchange value of the contemporary French franc. Under either the last official price of gold or the SDR-based methods for conversion, TWA's liability in this case would be limited to roughly $6500. The use of the contemporary French franc would yield a somewhat larger recovery, while conversion at the free market value would produce a recovery many times greater, but still significantly less than the actual value now claimed for the shipment (Pet. App. A-4 to A-6).

States and other IMF members of the obligation of maintaining par values of their currencies and to adopt the Special Drawing Right (SDR) as the unit of account of the IMF. See note 5, *infra*. Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937. The Second Amendment took effect on April 1, 1978. This amendment was accepted by Congress. Pub. L. No. 94-564, 90 Stat. 2660. By the same legislation, the Par Value Modification Act, which had fixed the par value of the dollar, was repealed. See pages 11-14, *infra*.

[5] SDRs are international reserve assets allocated by the IMF to member countries to supplement existing reserve assets.

At the time the original Articles of Agreement of the International Monetary Fund became effective in 1945, the dollar, which then had a fixed par value in terms of gold, was the IMF unit of account. See note 4, *supra*. The SDR was created by the IMF nations in 1969. First Amendment of Articles of Agreement of the International Monetary Fund, July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748. The SDR was originally defined in terms of gold and was equal in value to the dollar.

In July 1974, after the advent of floating exchange rates, the SDR was revalued as the sum of specified amounts of a number of currencies. Under the Second Amendment of the IMF Articles of Agreement, the SDR's value is no longer defined in terms of gold but is determined daily on the basis of the market exchange rate for specified amounts (a mixed "basket") of a number of major national currencies. Although the United States dollar is a major component of the basket, the value of the dollar in terms of the SDR varies over time, depending upon changes in exchange rates for the various currencies in the "basket." Each day, the IMF publishes a valuation for the dollar in terms of SDRs. Under the 1978 Amendment to the IMF Articles of Agreement the SDR became the IMF unit of account.

TWA proposed that its liability in this case be established as the dollar value, on the date of loss, of that number of SDR's which had, on March 31, 1978, a value equivalent to the limitation rate, stated in gold, by the Convention.

The district court stated: "[w]ere we writing on a clean slate we would find the arguments in favor of * * * [the SDR] most persuasive" (Pet. App. A-27). It concluded, however, that the calculation of the dollar amount should be made by using the last official price of gold fixed by the Par Value Modification Act. *Ibid.* The court observed that this measure remained the basis for the liability limitations stated in dollars in international air tariffs filed with the Civil Aeronautics Board. In the court's view, this measure "c[a]me[] as close as anything to constituting a governmental interpretation of the Article 22 limitation" (*ibid.*), to which deference was due. Accordingly, Franklin Mint was awarded $6,475.98, plus interest and costs (*id.* at A-28).

2. The court of appeals affirmed "the result reached in this case" (Pet. App. A-3), adopting the district court's reasoning and citing the reliance interests of the parties as the rationale for that disposition (*id.* at A-19). The court of appeals nonetheless purported to "hold the Convention's limit on liability prospectively unenforceable in United States Courts" (*id.* at A-3). The court believed that "neither international nor domestic sources of law specify a unit of account for purposes of the Convention" (*id.* at A-17). In particular, the court understood the repeal of the Par Value Modification Act to preclude reference, for purposes of enforcing the Convention, to the price of gold set by that Act (*id.* at A-14):

> The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of $42.22 per troy ounce was no longer recognized by the United States. We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this

> repeal must be taken as a statement that the official price no longer reflects that specified value.

The court of appeals found that each of the other conversion mechanisms proposed by the parties was equally untenable. The court regarded use of the current French franc or the free market value of gold as inconsistent with the intent of the contracting nations to establish a non-parochial, internationally recognized, uniform and stable unit of measure for the liability limitation under the Convention (Pet. App. A-15). Use of the SDR as the basis for conversion was, in the court's view, simply unauthorized by the Convention. The court of appeals also assumed that use of the SDR would have required it to determine the number of SDRs to be awarded per kilogram of freight loss—and thus to legislate the level of limitation. Finally, the court suggested that it was precluded from adopting a unit of conversion "variable at the whim of an international body distinct from the parties to the Convention" (*id.* at A-17).

Thus, the court of appeals determined that the essential ingredient of the formula by which the Convention's limit on liability had previously been translated into United States dollars had been eliminated "as a consequence of international action followed by domestic legislation" (Pet. App. A-17). As a result, the court concluded that the parties were asking it "to select * * * as a matter of policy, a new unit of conversion" (*ibid.*). This, the court explained, was beyond its authority, because "selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties [to the Convention]," and "such a unit must be selected either through treaty ratification by the Senate or by legislation passing both the Houses of Congress" (*id.* at A-17, A-18).[6]

[6] The court of appeals announced (Pet. App. A-19) that its ruling would

> apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. * * * Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling.

The court's mandate has been stayed pending the determination of these petitions for a writ of certiorari.

DISCUSSION

The court of appeals has decided important and recurring questions of law in a manner that deviates from established principles regarding the validity and enforceability of treaties. The court's decision threatens to undermine a significant international law regime to which the United States is committed and to subject this country to adverse repercussions in the international community. We accordingly urge that certiorari be granted to resolve the questions presented.

1. The principles that govern this case are well settled. "[A] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U.S. 102, 120 (1933). See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934). When considering questions that arise under a treaty, courts must

> construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

Bacardi Corp. v. *Domenech*, 311 U.S. 150, 163 (1940). Finally, courts are to give treaties "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose." *Wright* v. *Henkel*, 190 U.S. 40, 57 (1903). These principles are not rendered inapplicable by the occurrence of events that were unforeseen by the nations that are party to the instrument. See, *e.g.*, *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, *supra*, 291 U.S. at 157-158.

In light of these principles, the court of appeals should have engaged in a two-step analysis. First, it should have determined whether Congress clearly intended to invalidate the liability limits of the Warsaw Convention when it repealed the Par Value Modification Act. We submit that the requisite specific and unambiguous intent cannot be

found here (see pages 10-14, *infra*). Second, upon concluding that the Convention remains in force, the court should have attempted to construe its language in view of pertinent statutes, governmental policies, and economic facts to accomplish its obvious purpose. The court of appeals' ability to determine a value for the limitation on liability for the litigants in this suit strongly suggests that it could have established a value in future suits as well. Other courts have regularly done so. See page 10 note 7, *infra*.

The decision of the court of appeals is inconsistent with these principles. The court below failed to give effect to the intent of the nations that entered into the Warsaw Convention, principally because it failed to ascertain that intent. In limiting liability, and in specifying that limit in terms of the Poincare franc (consisting of a stated quantity of gold of a prescribed level of purity), the contracting nations intended to establish an internationally uniform and stable standard—and above all to impose a *limit* on air carrier liability. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967). The treaty regime represented a compromise between the interests of transport users and carriers and the interests of the various nations party to the Convention. Transport users obtained a fixed system of nearly-absolute liability, and an opportunity to provide themselves with additional protection by declaring excess value at the time of shipment. In return, carriers received a fixed and certain standard of liability and the limitation on recovery at issue in this case. Moreover, the treaty eliminated conflicts of laws problems, involving differing standards of fault in different countries, to the advantage of all.

The court of appeals proceeded as if Article 22 of the Warsaw Convention were a prescription for liquidated damages (see Pet. App. A-14). In the court's view, if it could not translate the gold-based liability limit fixed by the Convention into dollars in a fashion that ensured that the dollar value awarded was the precise one prescribed by the Convention, it was powerless to give any effect to Article

22 (*id.* at A-5, A-17). The court of appeals thus ignored entirely the most critical facet of the intentions of the contracting parties—the unambiguous intent to adopt a ceiling on damages for loss of shipped goods. The court instead substituted a regime of completely unbounded liability.

Abrogation of the limitation on liability is the one alternative that simply cannot be squared with the provisions of Article 22. The court of appeals should have determined which of the proposed measures for translating the limits prescribed by the Convention into dollars best effectuated the intent of the framers. The court was not free to abdicate that responsibility simply because it concluded that no perfect measure of conversion was available. The court's refusal to enforce any limitation on liability at all was in clear violation of the mandate of the Convention.

2. The court of appeals substantially exaggerated the obstacles to ascertainment of the appropriate measure of conversion.[7] Specifically, the court's explanation of its rejection of TWA's proposal to convert the Convention liability limit into dollars at a rate of $42.22 per ounce of gold is seriously flawed.

a. Contrary to the decision of the court of appeals, the repeal of the Par Value Modification Act in 1978 does not preclude use of the last official price of gold established by that Act, $42.22 per troy ounce, for translation of the gold-based liability limits prescribed by the Convention into dollars. Especially when the appropriate inquiry is made—*i.e.*, what measure of conversion best effectuates the intent of the parties to limit liability—the court of appeals' objections to use of this measure appear insubstantial.

The Warsaw Convention is a self-executing treaty that provides a source of rules of decision applicable in United States courts without enactment of any supplementary implementing legislation by Congress. See, *e.g.*, *Indemnity*

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[7] **Although substantial changes in international currency arrangements have taken place since 1971, courts both in the United States and elsewhere have found it possible to interpret Article 22 of the Convention so as to effectuate the original intent to limit the liability of carriers thereunder. See Brief of the International Air Transport Association 17 nn. 51 & 52. See also Pet. App. A-12 to A-13 & nn. 14-19. These decisions strongly suggest that the court of appeals could have given effect to the Convention.**

Insurance Co. of North America v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944); *Garcia* v. *Pan American Airways, Inc.*, 269 App. Div. 287, 55 N.Y. Supp. 317, aff'd, 295 N.Y. 852, 67 N.E.2d 256, cert. denied, 329 U.S. 741 (1940). See generally *Bacardi Corp.* v. *Domenech*, *supra*, 311 U.S. at 161. Neither the Par Value Modification Act fixing the value of $42.22 per troy ounce of gold for international exchange purposes, Pub. L. No. 93-110, Section 1, 87 Stat. 352, nor any of its predecessors that fixed other prices, or authorized the President to do so (see, *e.g.*, Par Value Modification Act, Pub. L. No. 92-268, Section 2, 86 Stat. 116 ($38 per troy ounce); Act of May 12, 1933, ch. 25, Section 43(b)(2), 48 Stat. 52 (authorizing President to fix by proclamation the weight of the gold dollar)), can properly be regarded as enabling legislation necessary to the enforcement of the Convention in United States courts. Accordingly, the repeal of those provisions, designed to fulfill other purposes, does not have the effect of rendering the liability limitation of the Convention unenforceable.

On March 31, 1978, one day before the Second Amendment of the Articles of Agreement of the International Monetary Fund took effect (see page 4 note 4, *supra*), dollar equivalents for the liability limits prescribed by the Warsaw Convention were a determinate quantity. Pursuant to Section 9 of Pub. L. No. 94-564, 90 Stat. 2661, the Par Value Modification Act was repealed effective April 1, 1978. There is no indication in the language or the legislative history of Pub. L. No. 94-564 that repeal of the Par Value Modification Act was intended to affect, much less abrogate, the liability limitation established by Article 22 of the Convention. Rather, the repeal of the Par Value Modification Act was part of legislation that amended the Bretton Woods Agreements Act and accepted the new Articles of Agreement of the IMF on behalf of the United States. See page 4 note 4, *supra*. Amendment of these articles was prompted by the fact that IMF member nations no longer wished to maintain par values as required under the original IMF Agreement. Accordingly, central to the new articles was the abolition of the requirement of par value maintenance that had been placed upon the United States and other countries by the original Bretton Woods Agree-

ments. The Par Value Modification Act was thus repealed as part of a process of reordering of international monetary affairs. As the House Report on H.R. 13955, 94th Cong., 2d Sess. (1976), which became Pub. L. No. 94-564, explained, under the new international regime "the U.S. has no legal obligations to establish and maintain a par value for the dollar." H.R. Rep. No. 94-1284, 94th Cong., 2d Sess. 13 (1976). Congress was not abandoning a unit of conversion; it was simply recognizing in domestic legislation that the United States had been relieved by international agreement of its undertaking to guarantee the basis for interchangeability of gold and dollars.

Thus, the court of appeals was plainly wrong in concluding that, by repealing the Par Value Modification Act, Congress "specifically rejected" (Pet. App. A-14) use of the price of $42.22 per troy ounce of gold for purposes of implementing Article 22 of the Warsaw Convention. There is no suggestion anywhere that Congress intended to preclude such use,[8] and legislative silence alone cannot satisfy the requirement of clear expression necessary to abrogate a treaty. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); see page 8, *supra*.

Nor was the repeal "relevant to the Convention" in the sense the court of appeals suggested, because repeal did not reflect the view that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A-14). On the contrary, the repeal of the Par Value Modification Act was a domestic response to an international consensus that gold was no longer a satisfactory international unit of account. Among the factors underlying this consensus were the insufficiency of the supply of gold and the rise of a previously unknown speculative free market in gold that interfered with its utility as a common monetary unit. See R. Lipsey & P. Steiner, *Economics* 713-725 (1978). But abandonment of gold as a unit of account between nations for purposes of the International Monetary

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[8] The court of appeals acknowledged that "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification] Act" (Pet. App. A-18).

Fund in no way suggested that the prevailing value of gold was no longer to be employed under *other* treaty regimes, that *did continue* to provide for such use. This is especially so because continued use of the fixed rate of $42.22 per troy ounce of gold provided by the last official value of gold rather precisely meets the expectations of the framers of the Warsaw Convention respecting the limitation of liability adopted. See page 9, *supra*. The needs of the IMF nations to ensure flexibility in exchange rates and to insulate international monetary transactions from the confounding effect of the emerging free market in gold—factors that prompted the international decision to abandon the fixed exchange rates based on a fixed par value for the dollar defined in terms of gold—simply have no application to the purposes of Article 22 of the Warsaw Convention.

In sum, the repeal of the Par Value Modification Act did not preclude resort to the price of $42.22 per troy ounce of gold to implement the liability limitation prescribed by the Warsaw Convention. That conversion rate, which served to effectuate the intent of the parties on March 31, 1978, was not rendered ineffective for that purpose one day later simply because express statutory authority prescribing an official gold price for other purposes was repealed. Cf. *United States* v. *Bornstein*, 423 U.S. 303, 307 n.1 (1976).

b. The price of $42.22 per troy ounce of gold was not without official standing under United States law after April 1, 1978. Pursuant to newly codified 31 U.S.C. 5117(b) (see Pub. L. No. 97-258, 96 Stat. 984) formerly 31 U.S.C. 405b, that value is used to govern issuance of gold certificates by the United States Treasury. And it is used to express the value of the gold reserves of the United States for general purposes. *1 Report of the Commission on the Role of Gold in the Domestic and International Monetary System* 13 (Mar. 1982). Moreover, the rate of $42.22 per troy ounce of gold has historically been used by the United States to determine the dollar amount of its subscription obligations to the capital stock of four major international financial institutions, the International Bank for Reconstruction and Development (the World Bank), the

Inter-American Development Bank, the International Development Association, and the Asian Development Bank.[9]

The court of appeals dismissed as irrelevant to the issue presented the continued use of the $42.22 conversion rate to value gold held in the United States Treasury (Pet. App. A-14 n.20). But what the court of appeals failed to recognize is that it was the abandonment of the $42.22 conversion rate for purposes likewise unrelated to the Warsaw Convention—*i.e.*, under the IMF Articles of Agreement—that is not relevant here. The various examples cited above of continued use of the $42.22 price merely illustrate that Congress did not reject use of that price for all purposes. In these circumstances, repeal of the Par Value Modification Act falls far short of a clear legislative decision to abrogate the Convention that would render the $42.22 conversion rate unavailable for use in United States courts.

c. We agree with the court of appeals' conclusion (Pet. App. A-15), although not with all of its supporting reasoning, that use of the exchange value of the modern French franc or of the free market value of gold to translate the liability limitation specified by the Warsaw Convention into dollars would be directly contrary to the intentions of the contracting nations. Use of the former measure is precluded because the parties carefully specified a unit distinct from the value of the modern franc—the Poincare franc consisting of a stated quantity of gold. Use of the free market price of gold is inappropriate because the parties plainly intended to adopt a relatively fixed value unaffected by the extreme fluctuations that have recently beset the free market in unmonetized gold—a market unknown at the time the Convention entered into force. The fluctuations induced by private speculation in gold have no place in the liability limitation regime of the Convention.

On the other hand, the SDR constitutes a potential alternative choice for implementation of the Warsaw Convention's limitation on liability. While we do not advocate the

[9] The articles of agreement of those institutions employ as a unit of account dollars of a specified weight and fineness of gold.

use of the SDR as a conversion mechanism, it is highly instructive that the dollar value of the Convention liability limitation arrived at through use of the SDR mechanism proposed by TWA is nearly identical to that provided by the official price of gold. Indeed, if translated into round figures, as is permitted by Article 22(4) of the Convention, the liability limitation in dollars is the same under either method of calculation.[10] Because the value of the SDR is computed by reference to a weighted basket of major currencies, it is relatively stable compared to any single currency over the long run. Indeed, the near identity of the liability limitations computed by the alternate routes is a telling indication that the court of appeals erred in suggesting that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A-14).

Conversion of the Warsaw Convention liability limits into dollars at the rate of $42.22 per troy ounce of gold therefore would effectuate the manifest purpose of the contracting nations: to provide a stable and binding limitation upon the liabilities incurred by international air carriers.

3. Because the question presented by TWA's petition is a substantial one that arises frequently in litigation and that affects important interests of the United States, we believe that it is appropriate for resolution by this Court. The Senate's recent vote withholding consent to ratification of Montreal Protocols 3 and 4,[11] which would have amended the Warsaw Convention to redefine the stated liability limits in terms of SDRs, enhances rather than detracts from the exigency of further review. The Senate's action bespeaks no controlling view as to the enforceability of the existing Convention limits—which remain part of our

[10] The court of appeals apparently did not consider the actual dollar liability limits that result from application of the alternative conversion mechanisms to be germane to its analysis. But because the cardinal objective in a case such as this must be to give practical effect to the intention of the contracting nations, it is highly relevant that alternative measures between which the court of appeals deemed itself unable to decide would produce nearly identical judgments.

[11] See Supplemental Memorandum of Potential Intervenors 1.

law—in United States courts. But the Senate's action means, as a practical matter, that the present Convention regime will remain in force for the foreseeable future. Because the Second Circuit encompasses New York City, the major gateway for international air traffic entering the United States, and virtually every international air carrier can be sued there, the decision of the court of appeals will have a far-reaching and unsettling effect.[12]

We note, however, our uncertainty whether TWA's petition, standing alone, brings before the Court a case or controversy within the Article III jurisdiction of this Court. This is a suit for money damages, not an action for declaratory relief. Because the court of appeals affirmed the judgment of the district court limiting TWA's liability *in this case* to an amount calculated at the rate of $42.22 per ounce of gold—a standard advocated by TWA—it is arguable that TWA's petition does not attack the judgment of the court of appeals and thus brings no actual controversy before the Court in the setting of a concrete case. TWA is, in effect, seeking review of the legal rule that the court of appeals has announced it intends to apply to *future* cases.[13]

We see no need for the Court to resolve this question, at least at the present juncture. Franklin Mint also has filed a certiorari petition, which seeks review of the court of appeals' judgment limiting its recovery in this case. Franklin

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[12] We note that the United States District Court for the Central District of California has recently followed and extended the declaration of the court of appeals in this case, holding that the personal injury liability limitation of the Warsaw Convention stated in terms of Poincare francs is unenforceable because indeterminate, and applying that holding to the case before it. *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, MDL-482 (Feb. 15, 1983).

[13] The court of appeals purported to declare the Warsaw Convention liability limit prospectively unenforceable. See page 7 note 6, *supra*. Because the court below did not apply that rule to this case, and because the relief sought by Franklin Mint in this action is purely monetary, it is arguable that that declaration forms no part of the court of appeals' judgment. If that is so, TWA's petition merely challenges the court of appeals' reasoning and not its judgment. This Court, however, "review[s] judgments, not statements in opinions" (*Mississippi University for Women v. Hogan*, No. 81-406 (July 1, 1982), slip op. 5 n.7).

Mint's petition, which was filed within 90 days of the order denying rehearing (see 82-1465 Pet. 2), presents the questions (1) whether the liability limits of the Warsaw Convention remain enforceable, (2) if not, whether the Convention limits nevertheless should be applied in this case, and (3) if the Convention limits retain any effectiveness, what is the proper standard for conversion. Franklin Mint's petition thus places before the Court a concrete controversy, resolution of which entails consideration of the issues raised by TWA.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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